

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES FOR THE USE AND
BENEFIT OF BELONGER
CORPORATION, INC. and BELONGER
CORPORATION, INC.,

Plaintiffs,

v.

JDM, LLC, and

Case No.

MICHAEL DUTCHER, and

LIBERTY MUTUAL INSURANCE
COMPANY,

Defendants.

COMPLAINT

Plaintiff Belonger Corporation ("Belonger"), by its counsel, Whyte Hirschboeck Dudek, S.C., brings this action against defendants JDM, LLC, Michael Dutcher, and Liberty Mutual Insurance Company, and states and shows the Court as follows:

PARTIES

1. Plaintiff Belonger Corporation, Inc. ("Belonger") is a Wisconsin corporation, with its principal place of business located at 2334 Stonebridge Circle, Unit D, West Bend, Wisconsin, 53095.

2. Defendant JDM, LLC ("JDM") is an Illinois limited liability Company, located at 5400 Newport Drive, Unit #19, Rolling Meadows, Illinois, 60008. Upon information and belief, the sole member of JDM is Michael Dutcher, who is domiciled in Illinois. JDM's registered

agent for service of process within the State of Wisconsin is National Registered Agents Inc., 8020 Excelsior Drive, Ste. 200, Madison, WI 53717.

3. Defendant Michael Dutcher ("Dutcher") is an adult individual who, upon information and belief, is domiciled in the State of Illinois. Upon information and belief, Dutcher is the sole member of JDM.

4. Defendant Liberty Mutual Insurance Company ("Liberty") is a Massachusetts stock insurance company, and at all times herein mentioned, was the surety for JDM on the Project.

JURISDICTION AND VENUE

5. This court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331, 28 U.S.C. § 1332, 28 U.S.C. § 1367, and 40 U.S.C. § 3133(b)(3)(B).

6. The contract at issue was to be performed and executed in Milwaukee County, Wisconsin. Venue therefore lies in the United States District Court for the Eastern District of Wisconsin pursuant to 40 U.S.C. § 3133(b)(3)(B) and 28 U.S.C. § 1391(b)(2).

BACKGROUND FACTS

7. Belonger, a women and minority owned business and small business concern, is a complete mechanical and plumbing contractor in the specialty trades and service industry, providing heating, ventilating and air-conditioning ("HVAC") and refrigeration for commercial and industrial applications.

8. Upon information and belief, JDM is a general contractor that purports to specialize in general contracting, construction management, design-build, carpentry, painting, and labor work.

9. In July, 2011, the United States Department of Veterans Affairs ("VA") awarded JDM contract number VA69D-C-1798 (the "Prime Contract") in the amount of \$8,717,000.00 to provide labor, material, tools and supervision necessary in order to expand the primary care/specialty clinics and to consolidate the kitchen located at the Clement J. Zablocki VA Medical Center in Milwaukee, Wisconsin (the "Project").

10. As a condition of receiving the award of the contract, JDM was required to obtain performance and payment bonds in a penal sum equal to \$8,717,000.00. Accordingly, JDM obtained a payment bond in that amount from Liberty, pursuant to which Liberty agreed to be bound to make payment to any subcontractor of JDM who furnished labor, material, or both in the prosecution of the work provided for in the Prime Contract, in the event that JDM failed to promptly make payment to such persons.

11. Effective September 9, 2011, JDM entered into a contract (the "Subcontract") with Belonger to furnish, among other things, all labor, materials, equipment, and other services necessary to complete certain plumbing work under the Prime Contract, in exchange for payment from JDM. Throughout the term of the Subcontract, JDM and Belonger executed various change orders, which also comprised part of the Subcontract. Pursuant to the Subcontract, Belonger was to be paid a fixed price for each of the tasks it performed under the Subcontract.

12. Belonger satisfied all of its obligations under the Subcontract, and completed its work under the Subcontract on or about December 15, 2016.

13. Upon information and belief, the VA has paid JDM the amounts that JDM is owed under the Prime Contract for the work performed by Belonger. Nevertheless, JDM has intentionally refused to pay Belonger for work that it performed on the Project in accordance with the Subcontract.

14. As of February 13, 2016, JDM owed Belonger payments for work and materials that Belonger provided in an amount equal to at least \$306,173.22.

15. Belonger has submitted a claim for payment to Liberty under the Bond, but Liberty has failed to pay Belonger the amount due.

FIRST CLAIM – BREACH OF CONTRACT (AGAINST JDM, LLC)

16. Belonger repeats and realleges paragraphs 1 through 15 above as though fully set forth herein.

17. Belonger has performed all of its obligations under the Subcontract.

18. JDM has breached the Subcontract in that it has failed and intentionally refused to pay Belonger in full for labor, services, and materials furnished pursuant to the parties' agreement.

19. Belonger has suffered and continues to suffer damages as a direct and proximate result of JDM's breach of contract, in an amount to be determined at trial.

SECOND CLAIM – BREACH OF CONTRACT (MILLER ACT PAYMENT BOND)

20. Plaintiffs repeat and realleges paragraphs 1 through 19 above as though fully set forth herein.

21. Liberty is obligated, pursuant to the Bond, to pay Belonger for labor, materials, and services furnished in the prosecution of the work provided for in the Prime Contract, and for which JDM has failed to make payment.

22. Liberty has failed to fulfill its obligation under the Bond to pay Belonger for labor, materials, and services furnished in the prosecution of the work provided for in the Prime Contract, and for which JDM has failed to make payment.

23. Belonger is entitled to payment from Liberty pursuant to the Miller Act, 40 U.S.C. § 3133.

THIRD CLAIM – THEFT BY CONTRACTOR (AGAINST JDM AND DUTCHER)

24. Belonger repeats and realleges paragraphs 1 through 15 above as through fully set forth herein.

25. Pursuant to the Subcontract, JDM agreed to, among other things, pay Belonger in exchange for Belonger's provision of plumbing and HVAC services and materials.

26. Upon information and belief, the VA has paid JDM for the services JDM has provided under the Prime Contract, an amount sufficient for JDM to pay its subcontractor, Belonger, for work Belonger performed under the Subcontract.

27. JDM has used the payments from the VA for a purpose other than payment of its subcontractor, Belonger, for work Belonger performed pursuant to the Subcontract. JDM's failure to use the payments from the VA for a purpose other than payment of Belonger constitutes theft pursuant to Wis. Stats. §§ 779.02, 779.16, and Wis. Stat. § 943.20.

28. Pursuant to Wis. Stats. §§ 779.02 and 779.16, JDM's theft is deemed theft by any officers, directors, members, partners, or agents responsible for the misappropriation, including Dutcher, JDM's owner.

29. As a result of JDM's and Dutcher's failure to pay Belonger for work it performed under the Subcontract, Belonger has suffered pecuniary losses amount of at least \$306,173.22, and continues to suffer losses.

30. Pursuant to Wis. Stats. §§ 779.02, 779.16, 895.446, and 943.20, Belonger is entitled to treble damages and the actual costs of its investigation and litigation from JDM and Dutcher.

PRAYER FOR RELIEF

WHEREFORE, Belonger prays for:

1. Monetary damages in an amount to be proven at trial, which may be trebled as provided under applicable law;
2. All costs of investigation and litigation, including reasonable attorneys' fees, as provided under applicable law;
3. Pre-judgment and post-judgment interest; and
4. Such other and further relief as the Court may deem just and proper.

Dated this 28th day of March, 2016.

s/ Emily A. Constantine

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